IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

THURSDAY, THE 11TH OCTOBER 2007 / 19TH ASWINA 1929

OP.No. 156 of 2003(R)

PETITIONERS:
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1. **C. HARIDASAN, SREE PRABHA,**
   ATTADAPPA P.O., KANNUR TALUK,
   KANNUR DISTRICT.

2. **K. RAMACHANDRAN, CHIRAG,**
   P.O. VALAPATTANAM, KANNUR DISTRICT.

BY ADV. SRI.T.K.MARTHANDAN UNNITHAN
SRI.V.JAYAKUMAR
SRI.K.P.UNNIKRISHNAN

RESPONDENTS:
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1. **THE STATE OF KERALA REPRESENTED**
   BY THE CHIEF SECRETARY, GOVERNMENT OF KERALA,
   TRIVANDRUM.

2. **KERALA WATER AUTHORITY REPRESENTED**
   BY THE MANAGING DIRECTOR, KERALA WATER
   AUTHORITY, JALABHAVAN, TRIVANDRUM.

3. **THE EXECUTIVE ENGINEER,**
   KERALA WATER AUTHORITY, MATTANNUR DIVISION,
   KANNUR DISTRICT.

4. **THE EXECUTIVE ENGINEER,**
   KERALA WATER AUTHORITY, KANNUR DIVISION,
   KANNUR DISTRICT.

BY ADV. SRI.M.V.MATHAI MUTHIRENTHY, SC, KWA
GOVERNMENT PLEADER SRI.R.LAKSHMINARAYANAN
SRI.JOY GEORGE, SC, KWA
SRI.C.UNNIKRISHNAN, SC, KWA

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 01/10/2007, THE COURT ON 11/10/2007 DELIVERED THE FOLLOWING:

OP. NO.156/2003

ORDER ON CMP. NO.176/2003 IN OP. NO.156/2003

DISMISSED

11.10.2007 **SD/- K.BALAKRISHNAN NAIR, JUDGE**

SD/- T.R.RAMACHANDRAN NAIR, JUDGE

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE GOVERNMENT ORDER NO.106/85/PW&T DT. 17.9.85.

EXT.P2:- COPY OF THE GOVERNMENT ORDER NO.GO(P) 110/86/W&T DT. 9.9.86.

EXT.P3:- COPY OF THE PROCEEDINGS OF THE MANAGING DIRECTOR OF KERALA WATER AUTHORITY DT. 7.8.91.

EXT.P4:- COPY OF THE COMMUNICATION DT. 16.11.01 ISSUED BY THE KERALA WATER AUTHORITY TO THE 1ST PETITIONER.

EXT.P5:- COPY OF THE LETTER DT. 4.4.02 ISSUED BY THE KERALA WATER AUTHORITY TO THE 2ND PETITIONER.

EXT.P6:- COPY OF THE REPRESENTATION DT. 7.12.01 SUBMITTED BY THE 1ST PETITIONER ADDRESSED TO THE MANAGING DIRECTOR, KERALA WATER AUTHORITY.

EXT.P7:- COPY OF THE REPRESENTATION DT. 14.6.01 SUBMITTED BY THE 2ND PETITIONER ADDRESSED TO THE MANAGING DIRECTOR , KERALA WATER AUTHORITY.

EXT.P8:- COPY OF THE JUDGMENT DT. 22.11.01 PASSED BY THE DIVISION BENCH OF THE HONOURABLE HIGH COURT OF KERALA IN WA. NO.3455/01.

EXT.P9:- COPY OF THE LETTER DT. 1.3.00 ISSUED BY THE SECRETARY, TO THE GOVERNMENT TO THE MANAGING DIRECTOR, KERALA WATER AUTHORITY.

EXT.P10:- COPY OF THE COMMUNICATION DT. 10.3.2000 TO THE LOWER AUTHORITIES BY THE MANAGING DIRECTOR OF THE KERALA WATER AUTHORITY.

EXT.P11:- COPY OF THE PROCEEDINGS DT. 7.11.95 ISSUED BY THE EXECUTIVE ENGINEER KERALA WATER AUTHORITY PH DIVISION KANNUR.

/TRUE COPY/

P.S. TO JUDGE

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THOTTATHIL B.RADHAKRISHNAN, J.

O.P.No.156 OF 2003

Dated this the 7th day of September, 2007

REFERENCE ORDER

The petitioners were N.M.R. operators in the Public Health Engineering Department before 1970, engaged through employment exchange. By Exts.P1 and P2, N.M.R. workers appointed prior to 1970 were eligible to continue in service till the age of 58 years, on regularisation. Exts.P1 and P2 are Government Orders issued in terms of Article 166 of the Constitution of India. Thereafter, on 1.3.2000, Ext.P9 letter, signed by the Additional Secretary for the Secretary to Government was addressed from the Irrigation Department to the Manging Director of Kerala Water Authority, stating that the Government Orders are clarified in the manner stated in that letter, including to the effect that for an N.M.R. employ to continue in the establishment till 58 years, following absorption, he has to continue in the same post. That letter is, apparently, not a Government order in terms of Article 166 of the Constitution. So much so, it is the contention of the petitioners

that the terms of Ext.P9 letter cannot water down the terms of absorption as governed by Exts.P1 and P2 Government Orders. It is the further contention that Exts.P1 and P2, which enable continuance of persons like the petitioner up to the age of 58 years, does not contain a condition that such continuance could be had only if they continue in the same post and therefore, what has been done as per the Government letter Ext.P9 is not a mere clarification, but inserting some stipulations into the Government Order issued under Article 166, which conditions were not there in those Government Orders.

2. However, even in the writ petition, the petitioners have fairly pointed out that Ext.P9 letter formed the basis of Ext.P8 judgment of the Division Bench of this Court in W.A.No.3455/01, rendered essentially treating Ext.P9 as a Government Order. That judgment, apparently, runs contrary to the contentions of the petitioners.

3. Learned counsel for the petitioners profitably referred to the provisions in Article 166 of the Constitution to point out that

the quality of Ext.P9 letter is not one that could be treated as the decision of the Government in terms of Article 166 and stated that this provision of law had escaped the notice of the Hon'ble Judges of the Division Bench while rendering Ext.P8 judgment. In that context, it is urged that the view taken in Ext.P8 judgment without noticing the quality of Ext.P9 document vis.a.vis. Exts.P1 and P2 Government Orders, require a second look and that such view has apparently been rendered without the Bench being appraised of the fact that Ext.P9 was only a letter from the Secretary to Government to the Managing Director of the Water Authority and not a Government Order. Adv.Sri.T.K.M.Unnithan, learned counsel for the petitioners, also submits that this has been an issue that had gained specific attention even at the stage of admission because the learned Judge who admitted this writ petition on 7.1.2003 was part of the quorum of the Division Bench that decided Ext.P8.

4. In **A.R.Antulay** v. **R.S.Nayak** [(1988) 2 SCC 602], the Apex Court noticed the concept of per incuriam to state, among other things, that when the decision cited as a precedent is one

rendered without noticing a crucial fact or a binding statutory provision, the cited precedent may not have necessary value for being applied to decide the issue in hand. The plea in this case is that the facts and quality of Ext.P9 vis.a.vis. Article 166, a constitutional provision, escaped the notice of this Court, while rendering Ext.P8 judgment.

In the aforesaid circumstances, I deem it appropriate that the issue in hand gains the attention of the Division Bench, having regard to the fact that Ext.P8 judgment was delivered by the Division Bench. For the aforesaid reasons, I adjourn this case for consideration of the Division Bench with a direction to the Office to place the files before the Hon'ble the Chief Justice for further orders.

THOTTATHIL B.RADHAKRISHNAN,
Judge

kkb.

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THOTTATHIL B. RADHAKRISHNAN, J

O.P.NO.156 OF 2003

REFERENCE ORDER

7th SEPTEMBER, 2007.

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